Filed 2/7/20 P. v. Tardy CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAMIEN LEE TARDY, Defendant and Appellant.	C086572 (Super. Ct. No. 16FE015244)

In the early morning hours of August 2, 2016, defendant Damien Lee Tardy shot a man in the face and shoulder at close range. Shortly thereafter, defendant shot the man three more times as he was on the ground attempting to crawl away. Remarkably, the man survived. Following a jury trial, defendant was found guilty of willful, deliberate, and premeditated attempted murder. (Pen. Code, §§ 187 subd. (a), 664, subd. (a).)[1] The

[1] Undesignated statutory references are to the Penal Code.

jury also found that he personally used, personally and intentionally discharged, and proximately caused great bodily injury with a firearm. (§§ 12022.5, subd. (a), 12022.53, subds. (b), (c), & (d).) The trial court sentenced him to an aggregate term of 32 years to life in state prison.

On appeal, defendant contends the evidence was insufficient to support a finding of attempted willful, premeditated, and deliberate murder. Defendant also contends the judgment must be conditionally reversed and the matter remanded for the trial court to determine whether he is eligible for "pretrial" mental health diversion as authorized under recently enacted section 1001.36. We conclude that substantial evidence supports defendant's attempted murder conviction, and that defendant is not entitled to relief under section 1001.36. Therefore, we affirm the judgment.

FACTUAL BACKGROUND

On the morning of August 1, 2016, M.G. was suffering symptoms from heroin withdrawal. He approached a woman he did not know, Daisy Groh, near a motel on Stockton Boulevard in South Sacramento and asked her if she could help him obtain heroin. After Groh placed two phone calls, a man arrived and supplied M.G. with a small amount of heroin. Before M.G. walked away, he told Groh that his girlfriend was expecting to receive some "government money" at midnight and indicated that he wanted to purchase more heroin at that time. Groh agreed to help M.G. and gave him her phone number.

Shortly after midnight on August 2, 2016, M.G. called Groh. When Groh answered, she was in a room at the motel with four individuals—her boyfriend, defendant, Vincent Cervantez, and another man referred to as Speedy. During the call, Groh agreed to connect M.G. with someone who could provide him with heroin and told him to come to the motel.

Upon his arrival at the motel around 12:30 a.m., M.G., who was dressed in all red clothes, was introduced to everyone in the room, including defendant. When asked, M.G.

indicated where he was from and denied being in a gang, explaining that he just liked the color red. After purchasing $20 worth of heroin from Cervantez, M.G. left the motel.

Approximately 10 to 20 minutes later, M.G. called Groh and asked for his money back due to the poor quality of the heroin. He said that the heroin was "garbage." In response, Groh informed M.G. that Cervantez would refund his money if he came back to the motel.

When defendant learned about M.G.'s request for a refund, he was upset and mad at M.G. for disrespecting Cervantez by complaining about the quality of the heroin. There was also some additional tension between defendant and M.G. because M.G. was from a different neighborhood and belonged to a rival subset of the Bloods gang. According to Groh's boyfriend, both defendant and Cervantez had asked M.G. where he was from when he initially came to the motel. Groh's boyfriend explained that there was "some aggression behind [the conversation]." He described it as "almost intimidating." Although the conversation did not escalate into anything physical, there was "tension in the air" when it ended.

Before M.G. returned to the motel, defendant and Cervantez retrieved a handgun from Cervantez's car and announced that they were going to rob M.G. They indicated that they wanted to take the "government money."

When M.G. arrived at the motel the second time, he asked Cervantez to give him a ride so he could obtain better quality heroin. M.G. told Cervantez that he did not need a refund if Cervantez agreed to do so. Thereafter, M.G., Cervantez, and defendant left together in Cervantez's car.

Cervantez made several stops after leaving the motel. First, he drove to a residence and purchased crystal methamphetamine, which everyone in the car smoked. He then drove to several stores so that M.G. could get "cash back" to purchase heroin. After M.G. secured $60 or $70, Cervantez drove to a parking lot where M.G. purchased heroin. M.G. smoked heroin in the parking lot and during the drive to his residence.

When they arrived, Cervantez parked on the street near the residence. M.G. rolled a "blunt" and talked with Cervantez for about 20 minutes. During the conversation, Cervantez agreed to pick M.G. up later. Defendant did not say anything.

As M.G. was getting out of the car, defendant asked Cervantez to open the trunk so he could get his sweater. At that moment, a bag M.G. was carrying ripped, spilling food in the car. After M.G. picked the food up (which he estimated took two or three minutes), he shook Cervantez's hand and then walked towards the back of the car. As soon as M.G. reached the trunk area, defendant shot him in the face. Defendant immediately shot M.G. a second time in the shoulder, causing him to fall to the ground. Shortly thereafter, defendant shot M.G. three more times as he was attempting to crawl away. When M.G.'s mother-in-law[2] came outside and said "hey, hey, hey," defendant and Cervantez got into the car and sped away.

Police officers arrived at the scene around 3:35 a.m. Shortly after 4:00 a.m., M.G. was taken to the hospital by ambulance. M.G. received treatment and was admitted to the trauma intensive care unit.

A medical exam revealed that M.G. had five gunshot wounds. He was shot twice in his left shoulder and once in his mouth, neck, and right leg. After multiple surgeries, M.G. was released from the hospital on August 11, 2016.

At trial, M.G. explained that he and defendant did not have an argument prior to the shooting; he believed "things were cool" or "okay" between them. M.G. further explained that defendant was waiting for him behind the car with his gun drawn; it was pointed "right at [his] face." M.G. noted that he was not armed with a weapon and had not "use[d] any kind of violence" on defendant prior to the shooting.

---

[2] M.G. referred to his girlfriend's mother as his mother-in-law.

DISCUSSION

1.0 Insufficient Evidence

Defendant contends the evidence was insufficient to support a finding of attempted willful, premeditated, and deliberate murder. According to defendant, his conviction must be reversed because the shooting was "a rash, panicked, and unconsidered impulse; an explosion of violence, rather than preexisting reflection." We disagree.

1.1 *Applicable Legal Principles*

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623; *People v. Pettie* (2017) 16 Cal.App.5th 23, 52.) "[U]nlike murder, attempted murder is not divided into degrees. The prosecution, though, can seek a special finding that the attempted murder was willful, deliberate, and premeditated, for purposes of a sentencing enhancement." (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605; see *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1049 ["attempted murder is not a lesser included offense of attempted premeditated murder, but premeditation constitutes a penalty provision that prescribes an increase in punishment"].)

"We do not distinguish between attempted murder and completed first degree murder for purposes of determining whether there is sufficient evidence of premeditation and deliberation." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8, disapproved on another ground in *People v. Mesa* (2012) 54 Cal.4th 191, 199.) " ' "In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' " ' [Citation.] ' "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." ' [Citations.] 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' " (*People v. Potts* (2019) 6 Cal.5th 1012, 1027.)

"We normally consider three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—but '[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.' [Citation.] If the evidence of preexisting motive and planning activity by itself is sufficient to support the first degree murder conviction on a theory of premeditation and deliberation, we need not review the evidence concerning the manner of killing." (*People v. Jennings* (2010) 50 Cal.4th 616, 645-646; see *People v. Streeter* (2012) 54 Cal.4th 205, 242 [the three factors are not exclusive, nor are they invariably determinative; instead, they are simply intended to guide an appellate court's assessment as to whether the evidence supports the inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse].) "A first degree murder conviction will be upheld when there is extremely strong evidence of planning, or when there is evidence of

motive with evidence of either planning or manner." (*People v. Romero* (2008) 44 Cal.4th 386, 401.)

1.2 *Analysis*

Viewing the evidence in the light most favorable to the judgment, we conclude a rational trier of fact could have found, beyond a reasonable doubt, that the attempted killing of M.G. was willful, premeditated, and deliberate. The evidence that defendant went to the trunk of Cervantez's car a few minutes prior to the shooting and waited for M.G. with his gun drawn shows planning activity and that he had time to reflect upon his plan to shoot M.G. Further, there was evidence from which the jury could infer that defendant had a motive to shoot M.G. The evidence at trial showed that defendant was upset and mad at M.G. for disrespecting Cervantez by complaining about the quality of his heroin, including calling it "garbage." There was also evidence that there was tension between defendant and M.G. because M.G. was from a different neighborhood and belonged to a rival subset of the Bloods gang. Finally, the fact that defendant shot M.G., who was unarmed, in the face and shoulder at close range and then shot him three more times after M.G. fell to the ground and was attempting to crawl away showed a deliberate intent to kill. That there was no evidence of any provocation or struggle immediately prior to the shooting supports an inference of a deliberate plan to kill. "The lack of provocation by the victim leads to an inference that an attack was the result of a deliberate plan rather than a 'rash explosion of violence.' " (*People v. Miranda* (1987) 44 Cal.3d 57, 87, disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4; see *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295 ["a close-range shooting without any provocation or evidence of a struggle . . . supports an inference of premeditation and deliberation"].)

2.0 Pretrial Mental Health Diversion

Defendant contends the judgment must be conditionally reversed and the matter remanded to the trial court to determine whether he is eligible for "pretrial" mental health

diversion due to specified mental disorders[3] under the recently enacted section 1001.36, which he argues is retroactive as to all cases not yet final. In support of his contention, defendant relies on the retroactivity rules of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*). Defendant additionally argues that equal protection principles require that the statute have retroactive effect. We disagree.

2.1 *Retroactivity Rules of Estrada and Lara*

Courts are divided as to whether section 1001.36 applies retroactively to cases not yet final on appeal under *Estrada* and *Lara*. (Compare *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted Dec. 27, 2018, S252220 (*Frahs*), *People v. Weir* (2019) 33 Cal.App.5th 868, review granted June 26, 2019, S255212, *People v. Weaver* (2019) 36 Cal.App.5th 1103, review granted Oct. 9, 2019, S257049, *People v. Burns* (2019) 38 Cal.App.5th 776, review granted Oct. 30, 2019, S257738, and *People v. Hughes* (2019) 39 Cal.App.5th 886, review granted Nov. 26, 2019, S258541, with *People v. Craine* (2019) 35 Cal.App.5th 744, 749, review granted Sept. 11, 2019, S256671 (*Craine*), *People v. Torres* (2019) 39 Cal.App.5th 849, review den. Dec. 11, 2019, S258491, and *People v. Khan* (2019) 41 Cal.App.5th 460, review granted Jan. 29, 2020, S259498.)[4] We conclude, in agreement with *Craine*, that the statute does not have retroactive effect as to cases, like this one, that had already reached the stage of conviction (whether by jury or by plea) before the statute's effective date.

---

[3] Defendant points to evidence in the record indicating that he suffers from mental health disorders that qualify for diversion under section 1001.36, including bipolar disorder and posttraumatic stress disorder (PTSD). (See § 1001.36, subd. (b)(1)(A).)

[4] We may consider, as persuasive authority, the cases that have been granted review by our Supreme Court. (Cal. Rules of Court, rule 8.1115(e)(1).)

Section 1001.36, effective June 27, 2018, provides that a trial court, "[o]n an accusatory pleading alleging the commission of a misdemeanor or felony offense" (with exclusions not relevant here), may grant "pretrial diversion" to a defendant who meets all of the requirements specified in the statute. (§ 1001.36, subd. (a).) These include, among others, "a mental disorder . . . including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or [PTSD]," as established by "a recent diagnosis by a qualified mental health expert" (§ 1001.36, subd. (b)(1)(A)), and proof to the court's satisfaction that the mental disorder "was a significant factor in the commission of the charged offense" or "substantially contributed to the defendant's involvement in the commission of the offense." (§ 1001.36, subd. (b)(1)(B).)

" '[P]retrial diversion' " as used in the statute means "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).)

Here, defendant was convicted and sentenced before the statute's effective date. Defendant, however, contends that the statute applies to him because it should be given retroactive effect. In support of his position, defendant relies on *Frahs*. For the reasons given in *Craine*, we conclude that *Frahs* was wrongly decided and the statute does not apply retroactively to persons, like defendant, "who have already been found guilty of the crimes for which they were charged." (*Craine*, 35 Cal.App.5th at p. 754, rev.gr.)

The *Frahs* court decided whether section 1001.36 is retroactive by applying the standard retroactivity rules of *Estrada* and *Lara*. In *Estrada*, the court held that when the Legislature amends a criminal statute so as to lessen the punishment for the offense, it must be inferred that the Legislature's intent was to apply the lighter penalty to all cases not yet final. (*Estrada, supra*, 63 Cal.2d at pp. 745, 748.) In *Lara*, the court extended this rule to situations in which new legislation, though not lessening punishment, provides an " ' "ameliorating benefit[]" ' " for accused persons or constitutes an " 'ameliorative change[] to the criminal law.' " (*Lara, supra*, 4 Cal.5th at pp. 308, 309.)

Taking these rules together, *Frahs* found that section 1001.36 confers an " 'ameliorating benefit' " on a class of accused persons and therefore must be understood to work retroactively. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, rev.gr.)

The *Frahs* court rejected the Attorney General's argument that by expressly restricting its scope to the "postponement of prosecution . . . at any point in the judicial process from the point at which the accused is charged until adjudication" (§ 1001.36, subd. (c)), the statute set a temporal limit on its retroactive effect. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, rev.gr.) The court reasoned: "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate." (*Ibid.*)[5] Concluding the issue could be resolved by applying *Estrada* and *Lara* to the plain language of the statute, the *Frahs* court denied the Attorney General's request for judicial notice of the statute's legislative history. (*Frahs*, *supra*, 27 Cal.App.5th at p. 789, fn. 2, rev.gr.)

In *Craine*, however, the court held that the *Frahs* analysis was flawed because it did not pay sufficient attention to how section 1001.36, subdivision (c), defines the timing of the "ameliorative benefit" it confers. In other words, *Frahs* did not properly consider either the phrase " 'postponement of prosecution' " or the phrase " 'until adjudication,' " instead relying only on a mechanical application of the *Estrada* and *Lara* rules. (*Craine*, *supra*, 35 Cal.App.5th at pp. 754-756, italics omitted, rev.gr.)

As to the phrase "until adjudication" (§ 1001.36, subd. (c)), *Craine* pointed out that " '[t]he purpose of [diversion] programs [in the criminal process] is precisely to *avoid* the necessity of a trial.' [Citation.]" (*Craine, supra,* 35 Cal.App.5th at p. 755,

---

5 *Frahs* did not address the first part of the statutory language quoted by the Attorney General (which is misstated as " ' "postponement *or* prosecution' ' "). (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, italics added, rev.gr.)

rev.gr.) In other words, absent clear statutory language showing otherwise, it makes no sense to say that a defendant can be given the benefit of "pretrial diversion" after a case has already gone through trial to conviction (or its equivalent, a guilty or no contest plea). (*Id*. at pp. 755-756.)

By the same token, the meaning of the phrase "the postponement of prosecution" (§ 1001.36, subd. (c)) depends on the normal usage of "prosecution" in the criminal process: " ' "[t]he proceeding by which a party charged with a public offense is accused and brought to trial and punishment. [Citations.]" ' " (*Craine*, *supra*, 35 Cal.App.5th at pp. 755-756, rev.gr.) "A prosecution 'commences when the indictment or information is filed in the superior court and normally continues until . . . the accused is "brought to trial and punishment" or is acquitted.' " (*Id.* at p. 756.)

Therefore, "[p]ursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone." (*Craine, supra*, 35 Cal.App.5th at p. 756, rev.gr.)

According to *Craine*, *Lara* is distinguishable because the ameliorative benefit discussed there (the initial processing of accused juveniles in juvenile court, and trial in adult court only upon transfer) did not create a temporal bar to retroactive relief, as does section 1001.36. (*Craine, supra*, 35 Cal.App.5th at pp. 756-757, rev.gr.)

Craine also examines the legislative history of section 1001.36 (which *Frahs* refused to consider) and finds that it points to the same conclusion. The history makes clear that the statute was intended to make it possible to use early intervention wherever possible, partly " 'to avoid unnecessary and unproductive costs of trial and incarceration.' " (*Craine, supra*, 35 Cal.App.5th at pp. 758-759, italics omitted, rev. gr. [quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, pp. 2-3].)

As *Craine* points out: "Early intervention cannot be achieved after a defendant is tried, convicted, and sentenced. The costs of trial and incarceration have already been incurred. Moreover, because mental health diversion is generally only available for less serious offenses, the reality is many defendants would already be eligible for parole or some other form of supervised release by the time their cases were remanded for further proceedings. Since mental health services are already available to parolees . . . , it is hard to imagine the Legislature intended for additional court resources and public funds to be expended on 'pretrial diversion' assessments at such a late juncture." (*Craine, supra*, 35 Cal.App.5th at p. 759, fn. omitted, rev.gr.)

For all the reasons stated in *Craine*, we disagree with *Frahs* and find that "pretrial diversion" under section 1001.36 is not available to defendant because he has already been tried, convicted, and sentenced.

2.2 *Equal Protection*

Defendant alternatively contends that equal protection principles require that section 1001.36 be applied retroactively to all defendants whose convictions are not yet final. According to defendant, if the statute is given prospective-only application, the result will be a state-adopted classification that affects two similarly situated groups (eligible and non-eligible defendants for pretrial diversion) in an unequal manner in violation of the equal protection clauses of the federal and California Constitutions. We disagree.

As the parties agree, we apply the "rational basis" test to defendant's equal protection argument. If the two subject groups or classes are similarly situated for purposes of the law challenged, we determine whether "the challenged classification bears a rational relationship to a legitimate state purpose." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*), overruled on another ground in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 875.) The rational relationship test, as articulated by our Supreme Court in *Hofsheier*, states that " ' " 'a statutory classification

that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification*. [Citations.] Where there are "plausible reasons" for [the classification], "our inquiry is at an end." ' " ' " (*Hofsheier*, at pp. 1200-1201.) The court explained that, " '[T]hose attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it," ' " stressing that the factual basis for that rationale must be "*reasonably* conceivable." (*Id*. at p. 1201.)

A purpose may be sufficient to uphold a classification regardless of whether it is the actual or expressly stated legislative purpose. (*Hofsheier*, *supra*, 37 Cal.4th at p. 1201.) "[I]t is irrelevant whether the perceived reason for the challenged distinction actually motivated the Legislature." (*Ibid*.) A proffered reason is sufficient if it " 'conceivably or "may reasonably have been the purpose and policy" of the relevant governmental decisionmaker' [citation] and that 'the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.' " (*Ibid*.) We must inquire "whether ' "the statutory classifications are rationally related to the 'realistically conceivable legislative purpose[s]' [citation]" . . . and . . . by declining to "invent[] fictitious purposes that could not have been within the contemplation of the Legislature . . . ." ' " (*Ibid*.)

Even assuming for the sake of argument that the two classes identified by defendant are similarly situated, we conclude there is a rational basis for the challenged classification here. The prospective-only application of section 1001.36 is rationally related to the purpose of avoiding the expenditure of additional court resources and public funds on pretrial diversion assessments *after* a defendant has been convicted. This purpose is " ' " 'realistically conceivable' " ' " and plausibly could have been within the contemplation of the Legislature. (*Hofsheier*, *supra*, 37 Cal.4th at p. 1201.) Indeed, as discussed above, the legislative history of section 1001.36 makes clear that

the statute was intended to allow early intervention wherever possible, partly to avoid unnecessary and unproductive costs of trial and incarceration. But early intervention and the avoidance of costs of trial and incarceration cannot be achieved where, as here, a defendant has been tried, convicted, and sentenced. Accordingly, we reject defendant's equal protection claim.

DISPOSITION

The judgment is affirmed.

/s/
Butz, J.

I concur:

/s/
Hoch, J.

RAYE, P. J., Concurring and Dissenting.

I concur in part 1.0 of the opinion. The evidence of willfulness, premeditation, and deliberation is so overwhelming as to make defendant's argument to the contrary lacking in credibility. I respectfully dissent from part 2.0 of the opinion.

The arguments on the retroactivity of Penal Code section 1001.36 are explicated in the cases cited by the majority. I will not bother to repeat the many well-stated views in support of retroactivity articulated in some of those cases. The Supreme Court has the issue before it and, in time, will articulate the definitive opinion on the issue. As noted by the majority, defendant suffers from mental health disorders that make him a candidate for diversion. The majority insists, however, that Penal Code section 1001.36 creates a "temporal bar" to retroactive relief, a bar that in defendant's case came crashing down on February 7, 2018, when the trial court sentenced him, fewer than six months before the statute became effective. According to the majority, "history makes clear that the statute was intended to make it possible to use early intervention wherever possible, partly ' "to avoid unnecessary and unproductive costs of trial and incarceration." ' " (Maj. opn. *ante*, at p. 11.) Because those costs had already been incurred, the majority insists that diversion is not available to defendant, no matter how compelling a case he might make before the trial court.

While cost savings were a consideration in the enactment of Penal Code section 1001.36, there is nothing in the history of the legislation that accords cost savings the importance attributed by the majority. Indeed, cost savings is not even mentioned in the statement of purpose set forth in the statute's preamble. There may be sound reasons to deny defendant the benefits of mental health diversion, but that should be a decision made by the trial court after considering his individual circumstances in light of the factors set forth in the statute. There is no sound reason to deny the benefits of the statute to a whole class of defendants based on cost savings and in light of the Supreme Court's

command that the rule of retroactivity expressed in *In re Estrada* (1965) 63 Cal.2d 740 must apply "to every case to which it constitutionally could apply . . . provided the judgment convicting the defendant of the act is not final." (*Id*. at p. 745.)

Accordingly, I believe the judgment should be conditionally reversed and the cause remanded to the superior court with directions to conduct a diversion eligibility hearing, as discussed within this opinion, no later than 90 days from the filing of the remittitur. Defendant would not be assured of diversion but would be granted his day in court to assert his case.

/s/
RAYE, P. J.